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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit insofar as it declined to enforce the Board's order, requiring the successor employer to honor the outstanding collective bargaining agreement into which its predecessor entered with the employees' union representative.

OPINIONS BELOW

The opinion of the court of appeals (App. A, 15-23) is not yet officially reported. The decision and order of the Board (App. C, 25-57) are reported at 182 NLRB No. 50.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1971, and was amended on July 12, 1971 (App. B, 24-24(f)). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a successor employer violates Section 8(a)(5) and Section 8(d) of the National Labor Relations Act by refusing to adopt and honor the outstanding collective bargaining agreement which its predecessor executed with the employees' union representative.

STATUTES INVOLVED

The relevant statutory provisions are set forth in App. D, 58-60.

STATEMENT

A. The Board's Findings of Fact

The Wackenhut Corporation, a nationwide guard service firm, provided plant protection services for Lockheed Aircraft Service Company ("Lockheed") at Ontario International Airport in California between 1962 and July 1, 1967 (App. C, 27, 40, 41; R. 67, 57-58, 86-88; E. 5).[1] On March 8, 1967, the Board certified the International Union, United Plant Guard Workers of America ("the Union") as the exclusive bargaining representative of Wackenhut's full-time and regular part-time employees performing plant

[1] "R." refers to the appendix filed with the court of appeals containing portions of the transcript of testimony. "E." refers to the separate volume of exhibits filed with that court.

protection duties for Lockheed at that airport (App. C, 27, 41; E. 7; R. 2-3). Wackenhut and the Union entered into a three-year collective bargaining agreement, which contained a clause making the agreement binding on "successors and assigns," on April 29, 1967 (App. C, 27, 42; E. 8(4)).

Lockheed's one-year contract with Wackenhut expired on June 30, 1967. In early 1967, Lockheed, as permitted by its contract, invited various guard services to bid for the job then being done by Wackenhut (App. C, 27, 42; E. 5(4)). The successful bidder was the William J. Burns International Detective Agency, Inc., another nationwide guard service firm (App. C, 27, 39-40, 42; E. 1 (1-2), 2(1), 3(1), 5(1), 13).[2]

During June 1967, Burns assisted the American Federation of Guards, Local 1 ("AFG") in organizing Wackenhut guards who applied for jobs with Burns (App. C, 27, 28, 42-46, 51; R. 7-22, 25-29, 30-43, 46-50; E. 12). Some of these employees were advised that Burns "couldn't live with [the Union's] contract," and that they had to join the AFG in order to work for Burns (App. C, 42, 44, 45, 46; R. 20, 28, 37-38, 42). On June 29, Burns' branch manager, Ingle, concluded that a majority of the employees to be assigned to the Lockheed job had signed AFG applications and, accordingly, recognized the AFG as their bargaining representative (App. C, 27, 48; R. 109-113, E. 3(2)).

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[2] Prior to making its bid, Burns was informed by Lockheed of the Union's recent certification and its current contract with Wackenhut (App. C, 27, 42; R. 116; E. 4).

Burns officially began performing the guard services on July 1 (App. C, 27, 42; E. 5(1)). On that date Burns' Lockheed work force of 42 employees consisted of 27 guards who had formerly been employed by Wackenhut and 15 employees who were transferred from other Burns jobs (App. C, 27-28, 42; E. 7(2); R. 112-113). The Burns guards performed basically the same services that guards had performed for Wackenhut (App. C, 27-28, 42, 47; R. 22-24, 29, 40, 43-44).[3]

On June 12, the Union demanded that Burns recognize it as the bargaining representative of Burns' employees at Lockheed and honor the collective bargaining agreement between the Union and Wackenhut (App. C, 28, 48, 50; E. 9). Burns declined to recognize the Union, by letter of June 24, because "any guards employed by our Los Angeles office at Lockheed * * * are members of and are represented by [AFG], a Union with whom our Los Angeles office now has a collective bargaining agreement and has had for over a period of years" (App. C, 28, 48, 50; E. 10).

B. The Board's Decision and Order

The Board held that Burns violated Section 8(a)(2) and (1) of the Act by assisting AFG in organizing employees and by recognizing AFG when it did not represent an uncoerced majority of Burns' em-

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[3] Although Burns mostly used its own supervisors, they performed functions similar to those performed by Wackenhut's supervisors (R. 62-65, 95-99). Burns' job supervisor at Lockheed had, in fact, worked for Wackenhut prior to the takeover (R. 98).

ployees (App. C, 28). The Board also found that Burns was a successor employer to Wackenhut since it employed a majority of former Wackenhut employees and continued essentially the same operation. Accordingly, it held that Burns violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (App. C, 28). Finally, the Board (with Member Jenkins dissenting) held that, as a successor to Wackenhut, Burns was obligated to honor the contract between Wackenhut and the Union, and that, by failing to do so, Burns further violated Section 8(a)(5) and (1) of the Act (App. C, 28-37).

In concluding that Burns was bound by its predecessor's collective bargaining agreement, the Board relied centrally on this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (App. C, 28-31). The Board concluded that its decision effectuated the policies of the Act, particularly "Congress' recognition [in Section 8(d), App. D, 58-60] of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements" (App. C, 32-33). It added (App. C, 34):

> In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement * * *. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning takeover of the business. Normally employees cannot make a comparable adjustment. Their basic security is the collective-

bargaining agreement negotiated on their behalf. * * *[4]

The Board ordered Burns to cease and desist from its unfair labor practices; to withdraw and withhold recognition from the AFG unless and until it was certified by the Board; to bargain collectively with the Union on request; to honor, adopt, and enforce the contract between Wackenhut and the Union, to give it retroactive effect, and to make the employees whole for any losses suffered by reason of Burns' refusal to honor the contract; and to post appropriate notices (App. C, 35, 51-57).

C. The Decision of the Court of Appeals

The court of appeals sustained the Board's finding that Burns violated Section 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the AFG (App. A, 18). It also sustained the Board's findings that a bargaining unit limited to Burns guards working at Lockheed was appropriate; that Burns was a successor employer to Wackenhut; and that, as such, it was required to recognize and bargain with the Union (App. A, 18-20).

The court held, however, that the Board had "exceeded its powers" in ordering Burns to honor the contract executed between Wackenhut and the Union, for, "[n]either the applicable case law nor the national labor policy justifies the Board in imposing a collec-

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[4] In a companion case, the Board held that the successor has a correlative right to insist that the union likewise adhere to the agreement executed with the predecessor. *Kota Division of Dura Corp.*, 182 NLRB No. 51.

tive agreement upon an unwilling party who had no part in the negotiation of the agreement" (App. A, 20-21). The court stated (App. A, 21):

> The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter, Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.*, at 102.

Nor, in the court's view, did *Wiley* sanction such a requirement. It asserted that "the policy behind the decision in *Wiley* was founded upon the Court's recognition of the 'central role of arbitration in effectuating national labor policy' ". The court concluded, therefore, that *Wiley* held only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed" (App. A, 22-23).[4a]

[4a] Accordingly, the court's judgment omits the requirement in the Board's order (App. C, 52, 35) that the Company make the employees whole for any losses suffered by reason of the Company's refusal to honor the contract (App. B, 24 ff.). Because the court found that the Company was under a duty as Wackenhut's successor to bargain with the Union, however, the judgment, as amended, requires the Company to make the employees whole for any losses suffered as a result of unilateral changes in working conditions (App. B, 24 ff.). Cf. *Valleydale Packers, Inc.*, 162 NLRB 1486, 1486-1487, enforced, 402 F. 2d 768 (C.A. 5), certiorari denied, 396 U.S. 825.

REASONS FOR GRANTING THE WRIT

The holding of the court below that a successor employer is not obliged, under the National Labor Relations Act, to honor an outstanding collective bargaining agreement, which his predecessor executed with the employees' union representative, conflicts with a recent decision of the Court of Appeals for the Tenth Circuit and is contrary generally to principles enunciated by this Court and applied by other courts of appeals. Resolution of the issue, moreover, is of manifest importance in the administration of the Act. Review by this Court is thus warranted.

1. An employer who takes over the business of another employer, and continues to operate it in essentially the same manner with a large proportion of the former employees, is a "successor" employer for purposes of the National Labor Relations Act. He is obliged not only to remedy his predecessor's unfair labor practices (see *United States Pipe and Foundry Co.* v. *National Labor Relations Board*, 398 F. 2d 544 (C.A. 5)), but also to honor the predecessor's obligation, if one existed, to recognize and bargain with a union representative. See, *e.g.*, *National Labor Relations Board* v. *Auto Ventshade, Inc.*, 276 F. 2d 303, 304 (C.A. 5); *Makela Welding, Inc.* v. *National Labor Relations Board*, 387 F. 2d 40, 46 (C.A. 6); *Overnite Transportation Co.* v. *National Labor Relations Board*, 372 F. 2d 765, 768 (C.A. 4), certiorari denied, 389 U.S. 838; *National Labor Relations Board* v. *Armato*, 199 F. 2d 800, 803 (C.A. 7). The issue here is whether the bargaining obligation which the Act imposes on a successor employer includes the obligation

to honor the outstanding collective bargaining agreement which the predecessor executed with the union.[5] This question has been the subject of much litigation before the Board,[6] and it is likely to continue to arise. Changes in the ownership of employing enterprises are a normal incident of our dynamic economy; it can fairly be anticipated that a significant number of such enterprises will be covered by a current collective bargaining agreement at the time of a change. A definitive adjudication regarding the successor's obligation to honor the existing agreement would therefore both aid the administration of the Act and enable employers and unions more intelligently to make plans respecting the purchase and sale of business enterprises.

2. The holding of the court of appeals below that a successor employer is not obligated to honor an out-

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[5] It is clear, of course, that the predecessor would violate Section 8(a)(5) and 8(d) of the Act if he failed to honor or abide by the agreement. See *National Labor Relations Board* v. *Strong*, 393 U.S. 357, 359; *National Labor Relations Board* v. *Huttig Sash & Door Co.*, 377 F. 2d 964, 968-969 (C.A. 8).

[6] See, *e.g.*, *Ranch-Way, Inc.*, 183 No. 116, enforced, *Ranch-Way, Inc.* v. *National Labor Relations Board*, No. 368-70, decided June 24, 1971 (C.A. 10); *Interstate 65 Corporation, d/b/a Continental Inn*, 186 NLRB No. 41, pending on application to enforce, C.A. 6, No. 71-1189; *Bachrodt Chevrolet Co.*, 186 NLRB No. 151, pending on application to enforce, C.A. 7, No. 71-1354; *Johnsky, d/b/a Avenue Meat Center*, 184 NLRB No. 94; *Polytech, Inc.*, 186 NLRB No. 148; *Denham, d/b/a Denham Co.*, 187 NLRB No. 53, pending on application to enforce, C.A. 9, No. 71-1943; *Kota Division of Dura Corp.*, 182 NLRB No. 51; *Emerald Maintenance, Inc.*, 188 NLRB No. 139, pending on petition to review, C.A. 5, No. 71-1591; *Travelodge Corp.*, 182 NLRB No. 52; *Davenport Insulation, Inc.*, 184 NLRB No. 114.

standing collective bargaining agreement executed by his predecessor directly conflicts with the decision of the Tenth Circuit in *Ranch-Way, Inc.* v. *National Labor Relations Board*, No. 368-70, decided June 24, 1971 (C.A. 10).[7] In *Ranch-Way*, the court, on facts closely analogous to those involved here,[8] ruled squarely that a successor "is bound by the collective bargaining provisions of an agreement between its predecessor and a union" (App. E, 64).

The decision below also is inconsistent with principles expressed by three other courts of appeals which have ruled that a successor employer is bound, despite his lack of consent, to arbitrate grievances arising under an outstanding collective bargaining agreement negotiated by his predecessor. *United States Gypsum Co.* v. *United Steelworkers*, 384 F. 2d 38 (C.A. 5), certiorari denied, 389 U.S. 1042; *United Steelworkers* v. *Reliance Universal, Inc.*, 335 F. 2d 891 (C.A. 3); *Wackenhut Corp.* v. *United Plant Guard Workers*, 332 F. 2d 954 (C.A. 9). These courts relied, as did the Board in the instant case, upon this Court's decision in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543.

In *Wiley*, a dispute arose between the successor company into which the predecessor had merged and the union which represented the predecessor's em-

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[7] We have reproduced the court's opinion as Appendix E, 61-64, to this petition.

[8] Ranch-Way, the successor, purchased a feed mill from Colorado Milling and Elevator Company. It retained 18 of the 25 employees covered by the collective bargaining agreement, as well as more than 75 percent of the predecessor's customers, and conducted the business "substantially the same as it had been before the sale" (App. E, 63).

ployees regarding the effect of the merger on certain employment conditions.[9] In a suit by the union to compel arbitration under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, the Court held that the successor was bound by the arbitration provisions of the predecessor's collective bargaining agreement. It explained (376 U.S. at 549):

> Employees, and the union which represents them, ordinarily do not take part in negotiations leading to a change in corporate ownership. * * * The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship. The transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to be resolved by arbitration rather than by "the relative strength * * * of the contending forces" * * *.

It is true, as the court below stressed in distinguishing *Wiley*, that the decision there (as well as the appellate decisions, other than *Ranch-Way*, which we be-

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[9] The issues which the union sought to arbitrate were: (1) whether the seniority rights built up by the employees of the predecessor must continue to be accorded them; (2) whether, as part of the wage structure of the employees, Wiley (the successor) had to continue to make payments to the union's security and pension plans; (3) whether the job security and grievance provisions of the contract continued in effect; (4) whether Wiley was liable for severance pay under the contract; and (5) whether Wiley was liable for vacation pay under the contract. 376 U.S. at 552.

lieve are essentially inconsistent with the ruling below) dealt specifically only with the duty to arbitrate. This factor, however, does not warrant a different approach or result with respect to whether the substantive provisions of collective bargaining agreements are binding on successors. Indeed, the duty to arbitrate does not exist in the abstract, but rather, in the context of a particular collective bargaining agreement. As this Court has said, "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement." *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597. Accordingly, decisions enforcing the duty to arbitrate necessarily have assumed, at least implicitly, that the provisions of the collective bargaining agreement, which are the subject of arbitration, are essentially binding on successors.[10] Moreover, while it is also true,

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[10] The Ninth Circuit, in *Wackenhut Corp.* v. *United Plant Guard Workers, supra,* for example, stated that, under *Wiley,* "the policy of the national labor laws obligates * * * the successor employer * * * to honor the collective bargaining agreement entered into by its predecessor," 332 F. 2d at 958. In *United States Steelworkers* v. *Reliance Universal Inc., supra,* the Third Circuit added the qualification that, in applying the collective bargaining agreement, "the arbitrator may properly give weight to any change of circumstances created by the transfer of ownership which may make adherence to any term or terms of that agreement inequitable." 335 F. 2d at 895.

In its decision here (App. C, 34) and subsequently (see *Em-*

as the court below emphasized, that the policy favoring arbitration is of central importance to national labor policy, the policy of encouraging the maintenance of existing collective bargaining agreements, which is reflected in Section 8(d) of the National Labor Relations Act,[11] is of equal significance.

This case, finally, is not governed, as the court below held, by *H. K. Porter Co.* v. *National Labor Relations Board*, 397 U.S. 99. In *Porter*, the parties had never agreed upon a contract covering the unit employees. The Court held that, in these circumstances, the Board could not order an employer to accept a particular provision sought by the union.

In this case, however, a contract has been executed by the predecessor employer and the union without any intervention by the Board, and the new employer, by electing to conduct essentially the same business

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erald Maintenance, Inc., 188 NLRB No. 139, n. 6, p. 9, *supra*), the Board has similarly recognized that there may be "unusual circumstances" which would render it inappropriate to apply the predecessor's contract to the successor. No such circumstances are present here; nor, of course, is there any question at this stage regarding the interpretation and enforcement, by an arbitrator, of a particular contract provision.

[11] Section 8(d) (App. D, 58-59) provides that, "where there is in effect a collective-bargaining contract * * * no party to such contract shall terminate or modify such contract, unless" it serves prescribed notices on the other party and maintains the contract in effect for 60 days thereafter or until its expiration date, whichever is later. It also provides that a party to a collective bargaining contract has the right to refrain from discussing or agreeing to modifications in contract terms or conditions, if such modifications are to take effect prior to the period fixed by the contract for reopening those matters.

operation, with many of the same employees, stands in the predecessor's shoes by operation of law. Accordingly, the situation may properly be viewed just as though the contract had been negotiated by the successor himself. The Court, in fact, noted this critical distinction in *Wiley*, stating (376 U.S. at 550): "This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated." It is, in short, the principle expressed in *Wiley* and followed by other courts of appeals, and not the holding of *Porter*, which controls this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1971.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 401-402—September Term, 1970

(Argued March 8, 1970 Decided April 26, 1971)

Docket Nos. 34889, 35055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, INTERVENOR

Before:

HAYS and FEINBERG, *Circuit Judges*, and CURTIN, *District Judge.**

Petition to review and set aside, and cross-application to enforce, an order of the National Labor Relations Board finding violations of Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(2) and (1) (1964)) for unlawfully recognizing and assisting the American Federation of Guards, and finding violations of Sections 8(a)(5)

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* Of the United States District Court for the Western District of New York, sitting by designation.

and (1) (29 U.S.C. §§ 158(a)(5) and (1) (1964)) for failure to recognize and bargain with the United Plant Guard Workers of America and failing to honor the contract executed between that union and the Wackenhut Corporation, Burns' predecessor.

Enforcement granted in part; denied in part.

SEYMOUR SWERDLOW, Los Angeles, California (Charles G. Bakaly, Jr., Richard C. White, Kathleen Peratis, O'Melveny & Myers, Los Angeles, California, on the brief), *for Petitioner.*

NANCY SHERMAN (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Julius Rosenbaum, Attorney, National Labor Relations Board, on the brief), *for Respondent.*

GORDON A. GREGORY, Detroit, Michigan (Gary A. Marsack, Livingston, Gregory, Van Lopik & Higle, Detroit, Michigan, on the brief), *for Intervenor.*

HAYS, *Circuit Judge*:

From 1962 until 1967 the Wackenhut Corporation provided plant protection services for the facility of the Lockheed Aircraft Service Company located at Ontario International Airport, Ontario, California. In 1967 Lockheed arranged with the William J. Burns International Detective Agency, petitioner on this appeal, to take over the plant protection duties from Wackenhut and on May 31, 1967 Lockheed notified Wackenhut that Burns would take over on July 1.

On March 8, 1967 the International Union, United Plant Guard Workers of America and its Amalga-

mated Local Union No. 162 were certified as representatives of Wackenhut's employees working at Lockheed and on April 29, 1967 Wackenhut and the union entered into a collective bargaining agreement to be in effect from April 29, 1967 until April 28, 1970.

On July 1, 1967 Burns took over the plant protection work at Lockheed. Burns employed for this purpose 42 guards, 27 of whom had previously been employed by Wackenhut.

The United Plant Guard Workers demanded that Burns recognize the union as the exclusive representative of Burns' employees at Lockheed and honor the collective agreement which the union had negotiated with Wackenhut. Burns refused both requests and the union thereupon filed unfair labor practice charges with the Board.

The Board, affirming the Trial Examiner's decision, held that Burns had violated Sections 8(a)(2) and (1) of the National Labor Relations Act (29 U.S.C. §§ 158(a)(2) and (1) (1964)) by unlawfully recognizing and assisting the American Federation of Guards, a "rival" union; that it had violated Sections 8(a)(5) and (1) (29 U.S.C. §§ 158(a)(5) and (1) (1964)) by failing to recognize and bargain with the United Plant Guard Workers of America; and that Burns was obligated to honor the collective bargaining agreement which had been entered into between the latter union and the Wackenhut Corporation. Burns petitions for review of the Board's order except for that portion charging it with unlawful assistance and recognition of the American Federation of Guards; the Board cross petitions to enforce the entire order. We enforce the Board's order except for that part which requires the company to honor the collective agreement between Wackenhut and its union.

I.

The Board found that Burns violated Sections 8(a)(2) and (1) of the Act by unlawfully assisting and recognizing the American Federation of Guards. Although Burns has not petitioned for review of this portion of the order, it apparently seeks to avoid the consequences of the Board's action by stating that it "has elected to comply with the portion of the Board's order requiring it to cease and desist from recognizing the American Federation of Guards as representative of its guards at the Facility." The fact, however, that the employer is willing to comply does not render the cause moot; the Board may still seek and secure enforcement from the courts. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563, 567 (1950). The Board's finding of unlawful assistance and recognition is amply supported by the record. We enforce that part of its order.

II.

The remainder of the Board's order deals with its finding that Burns unlawfully refused to recognize and bargain with the United Plant Guard Workers of America and to honor the collective bargaining agreement which that union negotiated with Burns' predecessor, Wackenhut.

Burns first contends that a bargaining unit limited only to Burns guards working in Lockheed is not appropriate and that therefore, the Board's order is not enforceable. Burns argues that the high degree of integration of its Ontario Sub-Office, which managed 30 contracts in addition to the contract at Lockheed, required a bargaining unit encompassing the entire area, particularly in view of the centralized control of labor relations that Burns claims existed there.

The Board on the other hand, argues, in support of its findings, that Burns' employees serviced the same facility that was considered an appropriate unit for Wackenhut employees, that Burns' employees had a community of interest, were supervised by one man on a full-time daily basis who had hiring and firing authority, and were paid a distinctly higher wage than other Burns employees in the Los Angeles branch area (which included Ontario).

The Board has a large measure of discretion in making unit determinations. See *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947); *Continental Insurance Co.* v. *NLRB*, 409 F.2d 727, 728 (2d Cir.), cert. denied, 396 U.S. 902 (1969). The centralization of final decisions on labor policy is not per se decisive of the extent of an appropriate unit where the Board has substantial justification for establishing a smaller unit. *Continental Insurance Co.* v. *NLRB; supra* at 729. We cannot say that the Board lacked such justification in this case.

We agree as well with the Board's finding that Burns is a successor employer to Wackenhut and as such is required to recognize the union chosen by Wackenhut's employees. See, e.g., *Tom-A-Hawk Transit, Inc.* v. *NLRB*, 419 F.2d 1025, 1026-27 (7th Cir. 1969). The determination that an employer is a successor is made on the basis of "continuity in the business operation," *NLRB* v. *Zayre Corp.*, 424 F.2d 1159, 1162 (5th Cir. 1970), that is, whether the operation is "essentially the same as that previously conducted . . . ." *S. S. Kresge Co.* v. *NLRB*, 416 F.2d 1225, 1234 (6th Cir. 1969). Has the "employing industry . . . retained its identity and continuity to a degree sufficient to make it reasonable that the successor employer be required to recognize the incumbent union[?]" (*Tom-A-Hawk Transit, Inc.* v. *NLRB, su-*

pra at 1027.) We think that it has in the instant case.

All of the important factors which the Board has used and the courts have approved are present in the instant case: "continuation of the same type of product lines, departmental organization, employee identity and job functions." *NLRB* v. *Zayre Corp.*, *supra* at 1163 (footnotes omitted). Both Burns and Wackenhut are nationwide organizations; both performed the identical services at the same facility; although Burns used its own supervisors, their functions and responsibilities were similar to those performed by their predecessors; and finally, and perhaps most significantly, Burns commenced performance of the contract with 27 former Wackenhut employees out of its total complement of 42.[1]

III.

From the fact that Burns was the successor of Wackenhut within the meaning of that term as applied by the Board and the courts, and was required to recognize the union chosen by Wackenhut's employees, it does not follow that Burns could be ordered by the Board to honor the collective agreement to which Wackenhut and its union were parties. In none of the previous successorship cases has the Board

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[1] Although the absence of wholesale hiring of predecessor's employees does not require a finding that there has been no successorship, see *Monroe Sander Corporation* v. *Livingston*, 377 F.2d 6, 12 (2d Cir.), cert. denied, 389 U.S. 831 (1967), its presence is releyant "to show similarity of operations." *Id.* The Court in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 551 (1964) placed great stress on this single factor by holding that "relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer of Interscience employees to the Wiley plant, apparently without difficulty."

ever reached that result. The successor has always been held merely to have the duty of bargaining with his predecessor's union. We conclude that in ordering Burns to honor the contract executed by Wackenhut, the Board has exceeded its powers. Neither the applicable case law nor the national labor policy justifies the Board in imposing a collective agreement upon an unwilling party who had no part in the negotiation of the agreement.

The action of the Board in this case is contrary to the letter as well as the spirit of the Supreme Court's recent decision in *H. K. Porter Co., Inc.* v. *National Labor Relations Board*, 397 U.S. 99 (1970). That case held that the Board and the courts "[are] without power to compel a company or a union to agree to any substantive contractual provision of a collective bargaining agreement." *Id.* at 102. As the Court points out, the legislative history of the National Labor Relations Act and of the enactment of § 8(d) of the Act,[2] strongly supports the conclusion that "the Board acts to oversee and referee the process of collective bargaining, leaving the results of the contest to the bargaining strengths of the parties." *Id.* at 108.

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[2] Section 8(d) reads as follows:

"For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession.* . . ." 29 U.S.C. § 158(d) (emphasis added).

> "While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *Id.* at 108.

The Board professes to find authority for its order to Burns to honor the Wackenhut contract in *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964).

The Board does not claim that *Wiley* stands directly for the proposition that all of a predecessor's contractual obligations can be imposed on an unwilling successor. The holding of *Wiley* is merely that "in appropriate circumstances, present here, the successor employer may be required to arbitrate with the union under the agreement." *Id.* at 548. Indeed, the *Wiley* case arose in the context of an action to compel arbitration under § 301 of the Labor Management Relations Act. (29 U.S.C. § 185 (1964).)

The Board contends, however, that the policy considerations upon which *Wiley* is based support its action in this case. But the policy behind the decision in *Wiley* was founded upon the Court's recognition of "the central role of arbitration in effectuating national labor policy." *Id.* at 549.[3] The Court's determination

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[3] The Court repeatedly emphasized this basis for its decision and the limited effect of its holding:

> "Here, the question is whether Wiley, which did not itself sign the collective bargaining agreement on which the Union's claim to arbitration depends, is bound at all *by the agreement's arbitration provision.*
>
> . . .

is only that "the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed." *Id.* at 550 (footnote omitted).

Although it is true that a rule such as that promulgated by the Board would put future potential successor employers on notice that existing contracts would be obligatory on them and thus provide them with a choice of action, the rule would bind the union to a contract with a successor employer without giving it any opportunity for choice. This could sometimes result in serious inequities. For example, where a union made substantial concessions to a failing employer in order to keep him in business and then discovered that the successor was a strong, financially viable organization, it would have no chance to bargain anew. The Board's holding that it will consider "unusual circumstances" (see, e.g., *Emerald Maintenance, Inc.*, 188 N.L.R.B. No. 139 (1971) where the Board, citing "unusual circumstances," refused to apply the rule it had earlier laid down in *Burns*) is no answer since it merely arrogates to the Board the additional power to pick and choose among the contractual provisions it will impose on non-contracting parties.

We refuse enforcement to that portion of the Board's order that requires Burns to honor the terms of the collective agreement between the union and Wackenhut.

. . . It would derogate from *'the federal policy of settling labor disputes by arbitration,'* . . . if a change in the corporate structure and ownership of a business enterprise had the automatic consequence of *removing a duty to arbitrate* previously established." *John Wiley & Sons* v. *Livingston*, 376 U.S. 543, 547, 549 (1964) (citation omitted) (emphasis added).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 34889, 35055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162, INTERVENOR

JUDGMENT

Before: Hays and Feinberg, Circuit Judges, and Curtin, District Judge.*

THIS CAUSE came on to be heard upon a petition to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated May 7, 1970, against the above-named Petitioner, its officers, agents, successors and assigns. The Court heard argument of respective counsel on March 8, 1971, and has considered the briefs and transcript of record filed in this cause. On April 26, 1971, the Court being fully advised in the premises handed down its opinion granting in part and denying in part enforcement of the Board's said order. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that The William J. Burns International Detective Agency, Inc., its officers, agents, successors and assigns, shall:

* Of the United States District Court for the Western District of New York, sitting by designation.

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 (the "Union") as the exclusive bargaining representative of all of its employees in the following collective bargaining unit: all full-time and regular part-time employees performing plant protection services, as determined by Section 9(b)(3) of the National Labor Relations Act, as amended, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

(b) Assisting or recognizing the American Federation of Guards (the "AFG") as the representative of its employees in the above-described unit for the purposes of collective bargaining, unless and until said labor organization shall have been certified as the exclusive bargaining representative of said employees in the above-described unit.

(c) Interfering with representation of its employees through labor organizations of their own choosing.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union.

2. Take the following affirmative action:

(a) Withdraw and withhold recognition from AFG as representative of its employees in the above-described unit.

(b) Bargain collectively, upon request, with the Union, with respect to its employees in the above-described unit, and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Post at its Lockheed, Ontario, California, operations, copies of the notice attached hereto as "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 31 (Los Angeles, California) shall, after being signed by Petitioner's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Judgment what steps Petitioner has taken to comply herewith.

PAUL R. HAYS
Judge, United States Court of Appeals for the Second Circuit

WILFRED FEINBERG
Judge, United States Court of Appeals for the Second Circuit

Filed: May 18, 1971

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A Judgment of the United States Court of Appeals enforcing in part an order of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT
(as amended)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards as representative of employees in the above unit until or unless it is certified as bargaining representative of our employees in said unit.

WE WILL bargain, upon request, with United Plant Guard Workers with respect to employees in the above unit, and, if any understanding is reached, embody such understanding in a signed agreement.

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.
(Employer)

Dated ..... By .....

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any questions concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Federal Bldg., Room 12100, 11000 Wilshire Blvd., Los Angeles, California, 90024, Telephone No. 824-7351.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 34,889, 35,055

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

etc.

It is hereby ordered that the motion made by counsel for the respondent, National Labor Relations Board, to vacate the judgment filed herein on May 18, 1971 and file in lieu thereof the Board's second proposed judgment, be and it hereby is granted to the extent of adding the following paragraph to the judgment of May 18, 1971, denominated as paragraph 2(c):

> (c) Make whole all persons employed in the above described unit for any loss of pay or other benefits they may have suffered as a result of unilateral changes in working conditions, reimbursement to be made in accordance with *F. W. Woolworth Co.*, 90 NLRB 289, and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

Paragraphs denominated 2(c) and 2(d) in the original judgment filed May 18, 1971 are now denominated 2(d) and 2(e), respectively. By this action we reverse our order of June 30, 1971, which

denied the same motion made by the respondent, National Labor Relations Board.

/s/ Paul R. Hays
(PAUL R. HAYS)

/s/ Wilfred Feinberg
(WILFRED FEINBERG)
U.S.C.JJ.

/s/ John T. Curtin
(JOHN T. CURTIN)
U.S.D.J.

Dated: July 12, 1971

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

DECISION AND ORDER

On June 4, 1968, Trial Examiner E. Don Wilson issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. He also found that the Respondent had not engaged in certain other unfair labor practices. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief, and the Charging Party (herein referred to as the Union) and General Counsel filed briefs in support of the Trial Examiner's Decision.

On January 31, 1969, the National Labor Relations Board, having determined that the instant case raised issues of substantial importance in the administration of the National Labor Relations Act, as

amended, ordered that this case be consolidated with three others [1] for the purpose of oral argument before the Board on March 12, 1969. The parties were given permission to file further briefs. Subsequently, on February 19, 1969, the Board extended the date of the oral argument to April 23, 1969.

The Board also invited certain interested parties to file briefs *amici curiae* and to participate in oral argument. Briefs were filed by: The Chamber of Commerce of the United States; American Federation of Labor and Congress of Industrial Organizations; International Union, United Automobile, Aerospace and Agricultural Implement Workers; The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; and the National Federation of Independent Unions. The Chamber of Commerce of the United States, The International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and the National Federation of Independent Unions did not choose to participate in the argument. The National Association of Manufacturers declined to either file a brief or participate in the argument.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the oral arguments, Respondent's motions to reopen the record and the General Counsel's and Charging Party's opposition thereto, and the entire record in the case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

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[1] *Travelodge Corp. et al.*, Case 21-CA-7694; *Hackney Iron & Steel Co.*, Cases 23-CA-2505, 23-CA-2554; *Kota Division of Dura Corporation*, 18-CA-2419.

Briefly, the facts show that Wackenhut performed plant protection services for Lockheed Aircraft Service Company, Ontario International Airport, Ontario, California. On March 8, 1967,[2] the Union was certified as exclusive bargaining representative for all of Wackenhut's full-time and regular part-time plant protection employees. On April 29, Wackenhut and the Union entered into a collective-bargaining agreement effective until April 28, 1970.

Pursuant to its agreement with Wackenhut, Lockheed let the service contract out for bids. On May 15, at a prebid conference attended by several general service contractors including the Respondent, Burns, Lockheed advised the prospective bidders that Wackenhut's guards were represented by the Union which had a recent Board Certification, and that there was in existence a labor contract between Wackenhut and the Union covering these employees. On May 31, Wackenhut was informed by Lockheed that Respondent would perform the guard services as of July 1.

Prior to its July 1 takeover, Respondent interviewed guards for employment who were at that time employed by Wackenhut. As more fully described by the Trial Examiner, the Respondent assisted the American Federation of Guards in the solicitation of employees Elmer Reitzel, Thomas Ware, Charles Blenkemeier, Harris Camp, Stanley Ganiewski, and Walter Drake. On June 29, Respondent recognized the American Federation of Guards as bargaining representative.

On July 1, when Respondent officially began the guard service duties theretofore performed by Wackenhut, some 27 guards formerly worked at Lockheed in the employ of Wackenhut began work as guard em-

[2] Hereinafter, all dates refer to 1967 unless otherwise stated.

ployees of Respondent. In addition, 15 employees of Respondent were transferred from other jobs and began work at Lockheed. Thus, in assuming guard functions at Lockheed, a majority of Respondent's work force was made up of ex-Wackenhut employees, and the nature of the business remained the same.

On July 12, the Union, by letter, made a demand upon Respondent that it recognize the Union as bargaining representative and honor the Union's collective-bargaining agreement with Wackenhut. By letter dated July 24, the Respondent declined recognition. Unfair labor practice charges were then filed which resulted in the issuance of the complaint in the instant proceeding.

The Trial Examiner concluded that Respondent violated Section 8(a)(2) and (1) of the National Labor Relations Act, as amended, by assisting the American Federation of Guards in organizing employees, and by recognizing the American Federation of Guards when it did not represent an uncoerced majority of Respondent's employees. In addition, the Trial Examiner found that Respondent was a successor employer to Wackenhut and that it violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union as the bargaining representative of its employees. We agree with these findings of the Trial Examiner.

We also agree with the Trial Examiner that Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the 1967 contract between Wackenhut and the Union. However, in view of the significance of the issue presented, we believe it is necessary to explicate fully our reasons for doing so.

The Supreme Court's Decision in *John Wiley & Sons* v. *Livingston*[3] altered the perspective in which

[3] 376 U.S. 543.

a successor employer's obligations to honor the provisions of a collective-bargaining agreement negotiated by his predecessor must be viewed. There, the predecessor employer was absorbed by merger into a larger acquiring company (Wiley). Some of the predecessor's employees were represented by a union, and the collective-bargaining contract, which did not contain a successors clause, was not scheduled to expire until over a year after the merger took place. Pursuant to an arbitation clause in the contract, the union brought suit to compel Wiley to arbitrate its claim that certain contract rights had survived the merger. The Court held that even though the predecessor had disappeared as a result of the merger, all rights of the employees covered by the preexisting collective-bargaining agreement did not terminate. The Court determined that under the circumstances presented Wiley was bound to arbitrate its obligations under the preexisting collective-bargaining agreement.

In reaching its conclusion, the Court specifically rejected the contention that Wiley could not be required to arbitrate under the preexisting collective-bargaining agreement because it was not a party to that agreement and had not consented to be bound by it. The Court stated at 376 U.S., 550:

> While the principles of law governing ordinary contracts would not bind to a contract an unconsenting successor to a contracting party, (footnote omitted), a collective bargaining agreement is not an ordinary contract . . . '[I]t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate . . . The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particu-

> lar industry or of a particular plant.' (Citation omitted) . . . Central to the peculiar status and functions of a collective bargaining agreement is the fact dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship.

As the foregoing indicates, the Supreme Court refused to rely upon common law contract doctrine in determining the nature of a purchasing-employer's obligation to arbitrate matters arising under a contract it had not signed. Rather, the Court construed the contract in the context of a national labor policy which accords a central role to arbitration as "the substitute for industrial strife" and as "part and parcel of collective bargaining itself" and found the necessary contractual foundation for the duty to arbitrate in the contract negotiated by Wiley's predecessor:

> "Therefore, although the duty to arbitrate, as we have said . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborne by the fact that Wiley did not sign the contract being construed. This case cannot readily be assimilated to the category of those in which there is no contract whatever, or none which is reasonably related to the party sought to be obligated. There was a contract, and Interscience, Wiley's predecessor, was party to it. We thus find Wiley's obligation to arbitrate this dispute in the Interscience contract construed in the context of a national labor policy." (376 U.S. 551).

The concept of substantial continuity in the employing industry enunciated as a necessary condition

for the survival of the duty to arbitrate when the ownership of a business changes hands is at the heart of our determination that a purchasing employer is a successor-employer within the meaning of the Act. In essence, the finding of successorship involves a judgment that the employing industry has remained essentially the same despite the change in ownership.[4] A normal consequence of such finding is that the successor employer is obligated to recognize and bargain with the union duly selected by the employees—albeit prior to the change in ownership—as their collective-bargaining representative. This consequence of successorship is rooted, *inter alia*, in the fact that

> "[i]t is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace . . . . ,"[5]

as well as in the fact that, having chosen a bargaining representative,

> "[t]here is no reason to believe that the employees will change their attitudes merely because the identity of their employer has changed."[6]

Binding the successor-employer to his predecessor's bargaining obligation furthers the policy of protecting the employees' exercise of the right to engage in collective bargaining through representatives of their own choosing. Requiring the successor-employer to negotiate proposed changes in existing terms and conditions of employment with the employees' bargaining representative promotes stability in the employing

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[4] See, e.g., *Cruse Motors, Inc.*, 105 NLRB 242, 247.

[5] *Kiddie Kover Co.* v. *N.L.R.B.*, 105 F.2d 179, 188 (C.A. 6).

[6] *N.L.R.B.* v. *Albert Armato*, 199 F.2d 800, 803 (C.A. 7).

enterprise's labor relations and furthers the interests of industrial peace. The obligation to bargain imposed on a successor-employer includes the negative injunction to refrain from unilaterally changing wages and other benefits established by a prior collective-bargaining agreement even though that agreement has expired.[7] In this respect, the successor-employer's obligations are the same as those imposed upon employers generally during the period between collective-bargaining agreements.[8]

The question before us thus narrows to whether the national labor policy embodied in the Act requires the successor-employer to take over and honor a collective-bargaining agreement negotiated on behalf of the employing enterprise by the predecessor. We hold that, absent unusual circumstances, the Act imposes such an obligation.

"The history of the collective bargaining process demonstrates that its object has long been an agreement between employer and employees as to wages, hours and working conditions evidenced by a signed contract or statement in writing, which serves both as recognition of the union with which the agreement has been reached and as a permanent memorial of its terms . . . . [t]he signed agreement has been regarded as the effective instrument of stabilizing labor relations and preventing, through collective bargaining, strikes and industrial strife." (*Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514). In enacting the 1947 amendments to the Act, Congress added Section 8(d) in which it

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[7] *Harold W. Hinson, d/b/a Hen House Market No. 3*, 175 NLRB No. 100, enforced, F.2d (C.A. 8) (1970). *Overnite Transportation Co.*, 157 NLRB 1185, enfd. 375 F.2d 765 (C.A. 4), cert. denied, 398 U.S. 838.

[8] *Marine & Shipbuilding Workers* v. *N.L.R.B.*, 320 F.2d 615 (C.A. 3).

defined in some detail the duty to bargain collectively, including within that definition a specific ratification of the holding in the *Heinz* case.

Section 8(d) also defined the duty to bargain as meaning that, "where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce . . . no party to such contract shall terminate or modify such contract", unless it serves prescribed notices on the other party, and maintains its contract in effect for 60 days therefrom, even though that period may extend beyond the contract's natural termination or expiration date. Section 8(d) also provides that a party to a collective-bargaining agreement has the right to refrain from discussing modifications which are to take effect prior to the period fixed by the contract itself for reopening negotiations. Section 8(d) thus clearly demonstrates Congress' recognition of the paramount role in maintaining industrial peace played by parties' adherence to existing collective-bargaining agreements.

The impressive policy considerations favoring the maintenance and adherence to existing collective-bargaining agreements are not wholly overborne by the fact that Burns has not signed the contract here in issue. Nor can a holding that Burns is obligated to honor and adhere to the express terms of the contract readily be equated with compelling Burns to agree to a bargaining proposal or make a concession it is unwilling to make.[9] Indisputably, there is a contract. That contract covers the employees of the employing industry which Burns took over; it was negotiated on

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[9] Section 8(d) provides that performance of the mutual obligation to bargain does not compel either party to agree to a proposal or require the making of a concession.

behalf of the employing enterprise by Wackenhut, Burns predecessor. That contract is reasonably related to Burns through its takeover of Wackenhut's Lockheed service functions and its hiring of Wackenhut employees. We find, therefore, that Burns is bound to that contract as if it were a signatory thereto, and that its failure to maintain the contract in effect is violative of Sections 8(d) and 8(a)(5) of the Act.[10]

In the normal case, we perceive no real inequity in requiring a "successor-employer" to take over his predecessor's collective-bargaining agreement, for he stands in the shoes of his predecessor. He can make whatever adjustments the acceptance of such obligation may dictate in his negotiations concerning the takeover of the business. Normally, employees cannot make a comparable adjustment. Their basic security is the collective-bargaining agreement negotiated on their behalf. In the instant case this is certainly so. They work in an industry in which the identity of their employer is subject to annual bidding for the right to perform the services they are engaged in furnishing. The contract involved herein was negotiated for a term of 3 years, but had been in existence for only 2 months at the time of Burns' takeover. Burns had knowledge of the agreement when it bid for the Lockheed service contract. It hired employees on whose behalf the agreement was negotiated. Accordingly, in order to fully protect the employees' exercise of the right to bargain collectively and to promote the maintenance of stable bargaining

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[10] *C & S Industries, Inc.*, 158 NLRB 454; *N.L.R.B.* v. *Huttig Sash & Door Co.*, 377 F.2d 964 (C.A. 8), enforcing 154 NLRB 811. See also, *Oilfield Maintenance Co., Inc., etc.*, 142 NLRB 1384.

relationships and concomitantly industrial peace in this industry, we conclude that Respondent Burns must be held bound to its predecessor's contract.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Recommended Order of the Trial Examiner, and orders that the Respondent, The William J. Burns International Detective Agency, Inc., Ontario, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order, with the qualification described below.[11]

Dated, Washington, D. C.

FRANK W. MCCULLOCH, Chairman

JOHN H. FANNING, Member

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

[11] Substitute "Judgment" for "Decree" wherever it occurs in footnote 6 of the Trial Examiner's Recommended Order.

Member Jenkins, dissenting:

My partial dissent is as follows:

There is no requirement in the Act that a successor employer be bound by the collective bargaining agreement in effect when the business is transferred. Whether to require the successor to be bound is therefore a matter of judgment or interpretation of the national labor policy. In the absence of a clear statutory command or binding judicial precedent, I would not impose the existing agreement on either the union or the employer.

Where the enterprise is marginal or faltering, the new management may have to rearrange the terms and conditions of employment if the business and the jobs are to survive. The union also may, as in the companion case of *Kota Division of Dura Corporation*, 182 NLRB No. 51, want the opportunity to alter employment conditions in the light of the new economic circumstances and relations brought into the situation by the new employer. In such cases, our goal should be to permit the parties flexibility in working out their new arrangements if either desires to do so, rather than to impose the existing agreement when one side may be seriously dissatisfied with it. The new employer is not a party to the agreement, and the union did not join in shaping and executing it with his circumstances in mind. Thus, to impose the agreement on the new relation may in many cases prove a source of friction and disruption, rather than the stability for which my colleagues hope.

Section 8(d) of the Act, in requiring "parties" to adhere to their agreements and give notice of termination well in advance, hardly supports the conclusion that the successor is bound by the agreement;

for that section refers only to a "party" to the contract, the successor is not a party, and the issue before us is whether he should be treated as if he were a party.

Unlike my colleagues, who rely principally on *John Wiley and Sons* v. *Livingston* to require that the existing agreement must continue in effect beyond the transfer of the business, I see little in that case to support that conclusion. The employees' rights at issue there were of a very narrow range, such as seniority, vacation pay, pension contributions and severance pay, rights which were fixed or already accrued by being, at least in part, earned through past performance of work, or "vested" as the Court referred to them. The Court held only that the arbitration clause in the old agreement survived the merger as an available method of resolving issues concerning these "vested" rights. This hardly amounts to a holding that the entire old agreement must be imposed on the new employment relation. Indeed, the Court's approval of arbitration and its inherent flexibility and adjustment to unforeseen circumstances might indicate that the old agreement should not be so imposed.

Accordingly, I would not hold that Burns is bound by the agreement between its predecessor, Wackenhut, and Lockheed.

Dated, Washington, D. C.

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS
BOARD

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

Case No. 31-CA-776

THE WILLIAM J. BURNS INTERNATIONAL DETECTIVE AGENCY, INC.

and

INTERNATIONAL UNION, UNITED PLANT GUARD WORKERS OF AMERICA AND ITS AMALGAMATED LOCAL UNION NO. 162

and

AMERICAN FEDERATION OF GUARDS, LOCAL 1, PARTY IN INTEREST

Gerald Goldman and *Clifford L. Hardy, Esqs.*, of Los Angeles, Calif., for the General Counsel.

O'Melveny & Myers, by *Charles G. Bakaly, Jr.* and *Seymour Swerdlow, Esqs.*, of Los Angeles, Calif., for the Respondent.

Livingston, Gregory, Van Lopik & Higle, by *Gordon A. Gregory, Esq.*, of Detroit, Mich., for the Charging Party.

TRIAL EXAMINER'S DECISION

Statement of the Case

E. DON WILSON, Trial Examiner: The original charge was filed on July 24, 1967, by International

Union, United Plant Guard Workers of America and its Amalgamated Local Union, No. 162, herein the Union, and an amended charge was filed on August 1, 1967. Upon the charge as amended, the General Counsel of the National Labor Relations Board, herein the Board, issued a complaint and notice of hearing dated October 25, 1967, alleging that The William J. Burns International Detective Agency, Inc., herein Respondent, had violated Section 8(a)(1), (2), (3), and (5) of the National Labor Relations Act, herein the Act.

Pursuant to due notice, a hearing in this matter was held before me in Los Angeles, California, on December 19 and 20, 1967. All parties but the party in interest fully participated. Briefs for the General Counsel, Respondent, and Charging Party have been received and considered.

Upon the entire record[1] in the case and from my observation of the witnesses, I make the following:

Findings of Fact

I. Respondent's Business

At all material times, Respondent has been a New York corporation with offices in various parts of the United States, including an office at Los Angeles, California, where it is engaged in providing protective, guard, and detective services to business firms throughout the United States.

In the course and conduct of its business operations, Respondent's Los Angeles office has an annual volume of business in excess of $500,000, and annually performs services valued in excess of $50,000 for

[1] The motion to correct the transcript is granted as is the motion to admit Respondent's Exhibit No. 5 into evidence.

firms outside the State of California, and annually performs services valued in excess of $50,000 for firms in the Los Angeles area, each of which ships products valued in excess of $50,000 directly outside the State of California.

The Wackenhut Corporation, herein Wackenhut, is a Florida corporation engaged in plant protection and security services for firms located throughout the United States. In the course and conduct of its business operations, Wackenhut has an annual gross volume of business in excess of $500,000, and it annually performs services valued in excess of $50,000 outside Florida.

Respondent and Wackenhut, each, is and at all material times has been, an employer engaged in commerce within the meaning of the Act.

II. The Labor Organizations

The Union and American Federation of Guards, Local 1, herein AFG, are labor organizations within the meaning of the Act.

III. The Unfair Labor Practices

A. *The Issues*

The issues include the following:

(1) Is Respondent a successor to Wackenhut;

(2) Is a unit limited to employees of Respondent at Lockheed, appropriate;

(3) Has Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union and by refusing to give effect to a contract between Wackenhut and the Union;

(4) Has Respondent violated Section 8(a)(2) and (1) of the Act by recognizing AFG as the

bargaining representative of Respondent's employees at Lockheed and by requiring membership in or an application for membership in AFG as a condition of employment at Lockheed;

(5) Did Respondent violate Section 8(a)(1) and (2) of the Act by promising and giving an employee a promotion and a raise because he assisted the AFG; and

(6) Did Respondent violate Section 8(a)(2) and (1) of the Act by assisting AFG in organizing Respondent's employees and by recognizing AFG when AFG did not represent an uncoerced majority of Respondent's employees?

B. *Respondent, Wackenhut and the Appropriate Unit*

At least beginning February 28, 1967,[2] Wackenhut performed plant protection services for Lockheed Aircraft Service Company, herein Lockheed, at Ontario International Airport. On this date, a majority of the employees in the following unit selected the Union as their bargaining representative in a Board election. The unit is:

> All full-time and regular part-time employees of Wackenhut performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office clerical employees, professional employees, supervisors, and all other employees as defined in the Act.

On March 8, the Regional Director certified the Union as the exclusive bargaining representative of the employees in the above unit.

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[2] Hereinafter all dates refer to 1967 unless otherwise stated.

On April 29, Wackenhut entered into a collective-bargaining contract with the Union to be effective until April 28, 1970. It contained a legal union security provision.

As provided by the agreement between Lockheed and Wackenhut, Lockheed let the service contract out for bids. On May 15, Lockheed advised Respondent that Wackenhut's guards were represented by the Union which had a contract after Board certification. On May 31, Wackenhut was told by Lockheed that Respondent would perform the guard services as of July 1. Wackenhut ceased performing the guard services and Respondent began performing the guard services for Lockheed. On July 1, Respondent's employees included 27 guards formerly employed by Wackenhut and 15 transferred employees of Respondent.

C. *Respondent Assists the AFG*

1. Reitzel

Elmer H. Reitzel was formerly an employee of Wackenhut. He was "Chairman of the Board" of the Wackenhut employees. About June 2, Major George Goddard, a supervisor of Respondent, interviewed Reitzel and gave him a job application. A few days later, Reitzel spoke to Mr. New, Respondent's Operations Manager, and a supervisor, about the job. New told Reitzel to see Jack Foley, an organizer for the AFG. Foley was seated from 15 to 30 feet away from New, in the same room. Foley gave Reitzel an AFG authorization card to sign and said employees had to belong to the AFG to work for Respondent, but Reitzel did not then sign it. Foley said Respondent couldn't live with the Union's contract. Reitzel asked for a copy of the AFG contract but did not get one.

Foley told Reitzel that as steward he would like to have him get the employees to sign authorization cards for the AFG. Reitzel said he'd talk to the employees. Reitzel left and then called a representative of the Union in Detroit. Reitzel told the representative Respondent and AFG wanted the employees to sign authorization cards to keep their jobs. The representative said it was all right if it meant their jobs. Foley mailed pledge cards to Reitzel. About 2 days later, Foley came to Reitzel and spoke to him about the cards. I have carefully studied Reitzel's testimony and find it is confused as to dates. I am convinced that Reitzel just did not remember when Goddard told Reitzel Respondent was considering promoting him to sergeant. Foley asked Reitzel if he had gotten authorization cards, which Foley had given him, signed. Reitzel said he was working on them. In the latter part of June, Goddard phoned Reitzel and asked him to bring the signed pledge cards to Respondent's office. Reitzel failed to do so. About 10 o'clock that evening, Captain Kretzlow, a supervisor, came to Reitzel's home and asked for the signed AFG cards and Reitzel explained that he didn't have them with him. The next morning at work, Goddard came to Reitzel and picked up the AFG cards.[3]

When Respondent took over Wackenhut's operations, Reitzel was promoted from guard to sergeant with a raise from $1.75 to $1.95 an hour with no additional obligations. There is insufficient probative evidence that Reitzel was promised the promotion or was promoted to sergeant in violation of Section 8(a)(1) or (2) of the Act. Reitzel's recollection of when he was told he would be promoted to sergeant is too confused to permit a finding.

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[3] The record makes clear there were about 18.

Respondent violated Section 8(a)(2) and (1) of the Act by New's direction to Reitzel to see Foley who as part of the hiring procedure told Reitzel he had to sign an AFG pledge card to work for Respondent and asked him to get other employees to sign for the AFG. Respondent similarly violated the Act by Goddard's request of Reitzel that he bring the signed AFG cards to Respondent's office and by Kretzlow's asking for the cards and by Goddard picking them up from Reitzel at work.

2. Thomas C. Ware

Ware was employed by Wackenhut as a guard. In early June, he went to Respondent's office with a filled out application for employment by Respondent. He gave his application to New. He told New he would like to know about pay and about hospitalization and other details. New directed him to Foley for answers. He saw Foley in the same room. Foley gave him no answers. Foley repeatedly pushed an AFG authorization card in front of Ware and told him the Union was out and that he had to sign the AFG card or not work for Respondent. Ware said that "in California" he had 30 days to make up his mind.

I find Respondent violated Section 8(a)(2) and (1) of the Act by New's assisting Foley in his solicitation for the AFG, of Ware.

3. Charles A. Blankemeier

On June 28, Blankemeier received an application for employment. The next day he returned the application when he went to Respondent's office to pick up a uniform. He saw Goddard and Kretzlow and asked for his uniform. As he was preparing to leave with

his new uniform, Goddard told him he had to sign an AFG authorization slip before he could have Respondent's uniform. He signed the AFG slip with Foley's name on it and left with the uniform.

I find Respondent violated Section 8(a)(2) and (1) of the Act by conditioning his receipt of Respondent's uniform, necessary for work with respondent, on his signing an AFG authorization card.

4. Harris K. Camp

About June 10, Camp went to Respondent's office for an application. He saw Goddard. Goddard told him to go into the next room. Camp did so and found Foley to be the only one there. Foley told him Respondent now had the contract and if Camp wanted to work for Respondent he would have to sign the AFG card. Foley handed him a card and Camp said he would think it over. He left and again saw Goddard who gave him a work application. The next day Camp brought this application back to Goddard. He was measured for Respondent's uniform. A couple of weeks later, on June 30, he went in to pick up his uniform and on top of it was an AFG union slip that was supposed to be signed by him. In the presence of Goddard, Kretzlow gave him the AFG slip to sign. He said it had to be signed. It was in with the paper work for the clothing.

I find Respondent, through Goddard and Kretzlow, assisted the AFG in signing up Camp, in violation of Section 8(a)(2) and (1) of the Act.

5. Stanley L. Ganiewski

Ganiewski was a Wackenhut guard who went to Respondent's office for employment about June 10. He saw Goddard and asked where the applications were. Goddard pointed to a room. Ganiewski went there

and found Foley there alone. Foley told him he'd have to join the AFG to work for Respondent. Foley spoke at length about the AFG and its contract. He asked Ganiewski to sign an AFG authorization card. The latter said he'd think about it and left.

I find Respondent, through Goddard, assisted the AFG in its solicitation of Ganiewski through Foley, in violation of Section 8(a)(2) and (1) of the Act.

6. Walter Drake

In the latter part of June, Drake went to Respondent's office and talked to Goddard and some captain. The captain brought to him an authorization card of the AFG and said he would have to sign it before he could go to work. He said it was for "their union." Drake said he had 30 days to sign the card. They said he would have to sign it before he could go to work. Later that day, Goddard told him he had 30 days to sign but Respondent would like to have the AFG authorization signed before he went to work. Drake signed the card.

Respondent, through Goddard and the captain, assisted the AFG in its organizing activities in connection with Drake and thereby violated Section 8(a)(2) and (1) of the Act.

C. *Respondent is a Successor to Wackenhut and Obligated to Bargain With the Union*

When Respondent began its operations at Lockheed during the certification year, and during the contract term, it performed the same operations at Lockheed as had Wackenhut. It had in its employ a majority of Wackenhut's former employees. There has been a substantial continuity of Wackenhut's business operations by Respondent. At least substantially

the same business facilities have been used. The working conditions are substantially the same. The services provided are substantially the same. Respondent's taking over Wackenhut's operations at Lockheed constituted no change in the "employing industry forming the appropriate bargaining unit for which the Union had been certified." *Maintenance, Incorporated*, 148 NLRB 1299. As in *Maintenance*, "Respondent commenced the performance of substantially the identical operations that had theretofore been performed by [Wackenhut], servicing the same facilities for the same customers in substantially the same manner and at the same work site, and utilizing for that purpose a former [Wackenhut] work force to perform the same functions and exercise the same skills."

Respondent had the duty to honor its employees' choice of a bargaining representative, the Union. This was a public obligation not arising from private contract. The Union "was entitled to statutory recognition at the time Respondent took over." *Maintenance, Incorporated, supra.*

It is clear "that Respondent assumed the obligation the Act imposes upon an employer to recognize and deal with its employees' majority representative when it selected as its work force the employees of the previous employer to perform the same tasks at the same place as they had in the past. These employees had already expressed their choice of bargaining representative, and continued to constitute an appropriate bargaining unit. As the certification year had not yet expired at the time the Union sought recognition and bargaining,[4] the presumption of the Union's continuing majority status applied and was not then vulnerable to attack." *Maintenance, Incor-*

[4] July 12.

porated, supra. Respondent was obligated to recognize and bargain with the Union as the statutory representative of its employees in an appropriate unit. Respondent violated Section 8(a)(5) and (1) of the Act by refusing to comply with the Union's July 12 demand for bargaining. It has been found that Respondent knew, when it bid for the Lockheed contract, that the Union was the certified bargaining representative.

Respondent challenges the appropriateness of the bargaining unit as applied to Wackenhut and as applied to Respondent. While a broader unit might have been appropriate, I find a unit of guards limited to a single facility is an appropriate unit. Here the certification was pursuant to a consent election agreement. There is no evidence that the Regional Director was arbitrary or capricious. A mere change of employers does not destroy the certification.

D. *Respondent Violated Section 8(a)(2) and (1) By Recognizing the AFG*

As has heretofore been found, the AFG did not represent an uncoerced majority of Respondent's employees on or before July 1, when Respondent recognized the AFG. Consequently, Respondent assisted AFG in violation of Section 8(a)(2) and (1) of the Act when it recognized the AFG as bargaining representative.

E. *Respondent Violated Section 8(a)(5) and (1) of the Act By not Honoring and Assuming and Doing Business Under the Contract Between the Union and Respondent's Predecessor, Wackenhut*

On April 29, the Union and Wackenhut entered into a collective-bargaining agreement covering Wack-

enhut's Lockheed employees, the contract to be effective until 1970.

While *Wiley* v. *Livingston*, 376 U.S. 543, dealt specifically only with the obligation of a successor employer to arbitrate under a contract with a union, the decision made clear that the rights of employees under a collective-bargaining agreement are not automatically terminated by the fact that one employer succeeds to the rights of another employer. The Court was concerned with whether, as here, the business remains the same. The Court recognized that employees do not ordinarily take part in negotiations, leading to changes in corporate ownership. The well being of employees is at best incidental to the negotiations. The Court held, "The objectives of national labor policy, reflected in established principles of federal law, require that the rightful prerogative of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship." The Court emphasized that a collective-bargaining agreement is not an ordinary contract.

The Union persuasively argues that in an industry of the nature here involved where the employer may be changed from year to year, the union contract should follow the unit rather than the employer. The employees may select a union which obtains a contract for their benefit and find the employer changes. If the new employer may ignore the contract, all negotiations for peaceful contractual relations come to naught. Here, if Respondent does not assume and honor the contract, economic stability is destroyed. To leave Respondent free to bargain from scratch and ignore the common law of the employing industry is to leave an industry such as this to contracts of no substance or meaning.

The *Wiley* reasoning has been applied in a situation very similar to the instant case. *Wackenhut Corporation* v. *International Union, United Plant Guard Workers of America*, 332 F.2d 954 (C.A. 9). There the court found that where, as here, there is a "substantial similarity of operation and continuity of identity of the business enterprise before and after the change in ownership," the successor employer is bound by the entire contract of the predecessor.

I find that Respondent by refusing to honor the contract between Wackenhut and the Union, refused to bargain in violation of Section 8(a)(5) and (1) of the Act since on or about July 24.[5]

IV. The Effect of the Unfair Labor Practices

The activities of Respondent set forth in section III, above, have a close, intimate, and substantial relation to trade, traffic and commerce among the several States, leading to labor disputes burdening and obstructing commerce and the free flow of commerce.

Conclusions of Law

Upon the foregoing findings of fact and the entire record in the case, I make the following conclusions of law:

1. Respondent and Wackenhut are employers engaged in commerce within the meaning of the Act.
2. AFG and the Union are labor organizations within the meaning of the Act.
3. All full-time and regular part-time employees of Respondent performing plant protection duties as determined in Section 9(b)(3) of the Act at Lockheed, Ontario International Airport; excluding office

[5] Cf. *Michaud Bus Lines, Inc.*, 171 NLRB No. 21.

clerical employees, professional employees, supervisors, and all other employees as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act.

4. By failing and refusing on July 24, and thereafter, to recognize and bargain with the Union as the exclusive bargaining representative of Respondent's employees in the above-described appropriate unit and by failing to honor and adopt and enforce the existing contract between Wackenhut and the Union, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. By assisting AFG in obtaining representation among its employees and by recognizing AFG as the exclusive bargaining representative of its employees at a time when AFG did not represent an uncoerced majority of Respondent's employees, Respondent engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) and (2) of the Act.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in unfair labor practices violative of Section 8(a)(1), (2), and (5) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to withdraw and withhold recognition from AFG unless and until that union is certified, in order to enable its employees to exercise their statutory rights free

from the unfair labor practices engaged in by Respondent.

It has been found that the Union is the certified bargaining representative of Respondent's employees in an appropriate unit and requested recognition and bargaining, the same being unlawfully refused, I shall recommend that Respondent bargain, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement. It has further been found that there is in existence a contract between Respondent, as successor to Wackenhut, and the Union. I shall recommend that Respondent honor, adopt and enforce that contract. I shall also recommend that Respondent give retroactive effect to all the clauses of the contract and make whole, with 6 percent interest, employees for any losses suffered by reason of Respondent's refusal to adopt, honor and enforce the agreement.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record herein, it is recommended that Respondent, its agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively, upon request, with the Union as the exclusive bargaining representative of its employees in the above-described unit.

(b) Refusing to adopt, honor and enforce its contract with the Union, as successor of Wackenhut.

(c) Assisting or recognizing AFG as the representative of its employees for the purposes of collective bargaining, unless and until said labor organiza-

tion shall have been certified as the exclusive bargaining representative of said employees in an appropriate unit.

(d) Interfering with representation of its employees through labor organizations of their own choosing.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to join or assist the Union or otherwise engage in activities protected by the Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Withdraw and withhold recognition from AFG until or unless it is certified as bargaining representative of Respondent's employees in an appropriate unit.

(b) Bargain collectively, upon request, with the Union and, if any understanding is reached, embody such understanding in a signed agreement.

(c) Honor, adopt and enforce the contract between Respondent, as successor to Wackenhut, and the Union and give retroactive effect to all the clauses of said contract and, with interest of 6 percent, make whole its employees for any losses suffered by reason of Respondent's refusal to honor, adopt and enforce said contract.

(d) Post at its Lockheed, Ontario, California, operations copies of the notice attached hereto as "Appendix."[6] Copies of said notice, to be furnished

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[6] In the event that this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be enforced by a decree of a United States Court of Appeals, the words "A DECREE OF

by the Regional Director for Region 31, shall after being signed by Respondent's authorized representative, be posted by it immediately upon receipt thereof and be maintained by it for a period of 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that such notices are not altered, defaced or covered by any other material.

(e) Notify said Regional Director, in writing, within 20 days from the date of the receipt of this Recommended Order what steps Respondent has taken to comply herewith.[7]

Dated:

/s/ E. Don Wilson
E. DON WILSON
Trial Examiner

THE UNITED STATES COURT OF APPEALS, ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

[7] In the event that this Recommended Order be adopted by the Board, this provision shall be modified to read: "Notify the said Regional Director, in writing, within 10 days from the date of this Order what steps the Respondent has taken to comply herewith."

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDED ORDER OF A TRIAL
EXAMINER OF THE
NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the
NATIONAL LABOR RELATIONS ACT
(AS AMENDED)

we hereby notify our employees that:

WE WILL NOT refuse to bargain collectively, upon request, with International Union, United Plant Guard Workers of America and its Amalgamated Local Union No. 162 as the exclusive bargaining representative of our employees in the following appropriate unit:

> All our full-time and regular part-time employees performing plant protection duties as determined by Section 9(b)(3) of the National Labor Relations Act, at Lockheed, Ontario International Airport; excluding office clerical employees, supervisors, and all other employees as defined in the Act.

WE WILL NOT refuse to adopt, honor and enforce our contract, as successor of Wackenhut, with the above-named Union and covering the above-described unit.

WE WILL NOT assist or recognize American Federation of Guards, Local 1, as the representative of our employees for the purposes of collective bargaining, unless and until it shall have

been certified as the exclusive bargaining representative of our employees in the above unit.

WE WILL NOT interfere with representation of our employees through labor organizations of their own choosing.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights to join or assist the United Plant Guard Workers or otherwise engage in activities protected by the Act.

WE WILL withdraw and withhold recognition from American Federation of Guards until or unless it is certified as bargaining representative of our employees in an appropriate unit.

WE WILL bargain, upon request, with United Plant Guard Workers and, if any understanding is reached, embody such understanding in a signed agreement.

WE WILL, as successor to Wackenhut, honor, adopt and enforce our collective-bargaining contract with United Plant Guard Workers and give retroactive effect to all clauses of said contract and, with interest at 6 percent, make whole our employees for any losses suffered by reason of our refusal to honor, adopt and enforce said contract.

THE WILLIAM J. BURNS
INTERNATIONAL DETECTIVE
AGENCY, INC.
(Employer)

Dated ---------- By ----------
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone No. 688-5850.

APPENDIX D

The relevant provisions of the Labor Management Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 141, *et seq.*) are as follows:

TITLE I—AMENDMENT OF NATIONAL LABOR RELATIONS ACT

Sec. 101. The National Labor Relations Act is hereby amended to read as follows:

* * * * *

Sec. 8(a). It shall be an unfair labor practice for an employer—

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

* * * * *

Sec. 8(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall ter-

minate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) * * * shall not be construed as requiring either party to discuss or agree to any modi-

fication of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

* * * *

Sec. 9 (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

* * * *

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

* * * *

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MARCH 1971 TERM

No. 368-70

[Filed June 24, 1971, United States Court of Appeals, Tenth Circuit, Howard K. Phillips, Clerk]

RANCH-WAY, INC., PETITIONER

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT AND CROSS-PETITIONER

On Application for Enforcement of an Order of the National Labor Relations Board

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Before HILL and JONES,* Circuit Judges, and BROWN, District Judge.

Bruce W. Sattler, Denver, Colorado, for Petitioner.

Nancy M. Sherman (Arnold Ordman, General Counsel; Dominick L. Manoli, Associate General Counsel; Marcel Mallet-Prevost, Assistant General Counsel, and James P. Hendricks, Attorney, National Labor Relations Board, with her on the brief) for Respondent and Cross-Petitioner.

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* Of the Fifth Circuit, sitting by designation.

JONES, Circuit Judge:

Colorado Milling and Elevator Company, operated a number of mills and plants at different places for processing and selling grain and products made from grain. Among its operations was a feed mill at Fort Collins, Colorado. It decided to cease operating feed mills and employ the capital required for their operations in other phases of its business. Harold Johnson, the manager of its Fort Collins plant, learned of the intention to close that operation. Johnson undertook to find a purchaser for the mill. Ranch-Way, Inc., a conglomerate of sorts, negotiated for the plant and ultimately became the buyer of it. Johnson remained as its manager. Before the purchase was made, Ranch-Way learned that there was an overriding union contract between Colorado Milling and Elevator Company and American Federation of Grain Millers, International, AFL-CIO. There was an appendix to the contract which provided for the relations between the Union and the Company at the Fort Collins plant. Ranch-Way was told that the Union was inactive, that the members were not paying dues, and it had some report that the Union may have lost its majority of the employees.

When the sale to Ranch-Way had been made, Johnson was authorized to negotiate with employees separately with respect to wages, and these negotiations, in most instances, resulted in a lower wage scale than was provided by the contract betwen Ranch-Way's predecessor and the Union. Under Ranch-Way's operation all employees were to have a two weeks vacation rather than a measure of vacation periods by seniority as was provided by the contract. One of the contract holidays was eliminated. Other changes were put into effect with respect to working conditions.

Eighteen of the twenty-five employees covered by the Union contract were hired by Ranch-Way. The business conducted was substantially the same as it had been before the sale. Over seventy-five per cent of the former customers continued with Ranch-Way.

The Union advised Ranch-Way that it expected the Union contract to be respected and honored. Ranch-Way, through its counsel, replied that it was not bound by the contract and indicated a belief that the Union did not have a majority.

The Union brought an unfair labor practice charge. The Regional Director filed a complaint alleging that Ranch-Way had refused to bargain with the Union in violation of Sections 8(a)(1) and (5) of the National Labor Relations Act. A hearing was held before an Examiner of the Board who decided that Ranch-Way was not bound by the contract between Colorado Milling and Elevator Company and the Union. His view was that because the contract covered many plants and over eight hundred employees it was inapplicable to the comparatively small single unit operation of Ranch-Way at Fort Collins. The Board rejected the views of its Examiner and held that Ranch-Way was the successor of Colorado Milling and Elevator Company and as such was bound by the contract with the Union. The Board ordered that Ranch-Way cease and desist from violations of the Act; that it honor, maintain and enforce the collective bargaining agreement and, upon request, bargain with the Union. The order directed that appropriate notices be posted. Ranch-Way has filed a petition asking that the Board's order be vacated. The Board has answered and seeks enforcement of its order.

No error appears in the Board's finding that there were no such differences between Colorado Milling

and Elevator Company and Ranch-Way as would render the contract inoperative as to Ranch-Way. This is particularly true since an appendix to the primary contract covers the Fort Collins operation with respect to the matters where differences of one kind or another might call for separate treatment.

Implicit in the Board's finding is a determination that Ranch-Way did not entertain a good faith doubt as to the Board's majority. The evidence on the record as a whole sustains the Board's finding.

Where there has been a lock, stock and barrel sale of a going concern, resulting in a substantial continuity of identity, the purchaser is bound by the collective bargaining provisions of an agreement between its predecessor and a union. See National Labor Relations Board v. Ideal Laundry Corporation, 10th Cir. 1970, 422 F.2d 803; National Labor Relations Board v. F. G. McFarland, 10th Cir. 1970, 306 F.2d 219.

There is no error in the Board's conclusion that Ranch-Way is a successor to the company from which it acquired the Fort Collins business. It is bound by the collective bargaining provisions of the Union contract. The order of the Board will be ENFORCED.